

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

3 UNITED STATES OF AMERICA,)

4 Plaintiff,)

5 vs.)

6 JERAD JOHN KYNASTON,
SAMUEL MICHAEL DOYLE,
7 BRICE CHRISTIAN DAVIS,
JAYDE DILLON EVANS,
8 TYLER SCOTT MCKINLEY,

9 Defendants.)

Nos. 12-CR-016-WFN-1
12-CR-016-WFN-2
12-CR-016-WFN-5
12-CR-016-WFN-6
12-CR-016-WFN-7

May 31, 2012
Spokane, Washington

Transcript of:
Second Pretrial Conference
and Motion Hearing

11 BEFORE THE HONORABLE WM. FREMMING NIELSEN
12 SENIOR UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 For the Plaintiff: Russell E. Smoot
Assistant United States Attorney
15 P.O. Box 1494
Spokane, WA 99210-1494
16

17 For Defendant Kynaston: Robert R. Fischer
Federal Defenders of Eastern
18 Washington and Idaho
10 North Post, Suite 700
19 Spokane, WA 99201
20

21 Reported By: Debra Kinney Clark, RPR, CSR
22 United States District Courthouse
P.O. Box 700
23 Spokane, WA 99210
(509) 458-3433
24

25 Proceedings reported by mechanical stenography; transcript
produced by computer-aided transcription.

1 APPEARANCES (Continued):

2 For Defendant Doyle: George P. Trejo, Jr., Attorney at Law
3 701 North First Street, Suite 100
Yakima, WA 98901-2203

4 For Defendant Davis: Mark Prothero, Attorney at Law
5 Miller & Prothero
6 421 West Riverside, Suite 868
Spokane, WA 99201

7 For Defendant Evans: Nicolas V. Vieth, Attorney at Law
8 601 East Sherman Avenue, Suite 1
Coeur d'Alene, ID 83814

9 For Defendant McKinley: Richard D. Wall, Attorney at Law
10 221 West Main, Suite 200
Spokane, WA 99201

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1 (May 31, 2012; 9:32 a.m.)

2 THE COURTROOM DEPUTY: United States of America v.
3 Jerad John Kynaston, et al., Case No. CR-12-0016-WFN. Time set
4 for second pretrial conference.

5 THE COURT: And motions. And I'm interested in the
6 defense motion to suppress the evidence. Mr. Wall, you filed a
7 motion --

8 (The courtroom deputy and the Court conferred off the
9 record.)

10 THE COURT: Oh. Excuse me. Yes. I'm going to ask
11 Ms. Knutson to do a roll call for the defendants first.

12 THE COURTROOM DEPUTY: For the defendants, we have
13 Robert Fischer with Defendant Kynaston, Defendant 1;
14 George Trejo, Jr., for Defendant 2, Mr. Doyle. We have
15 Mark Prothero in place of David Miller for Defendant Davis,
16 Defendant 5; Mr. Nicolas Vieth for Defendant Evans, No. 6; and
17 Richard Wall for Defendant 7, Mr. McKinley. And for the
18 government, we have Mr. Russell Smoot.

19 THE COURT: Good to see you all here.

20 As I started to say, I'm interested in that motion to
21 suppress the evidence. The change in the medical marijuana law
22 I think has a significant effect on this case. Prior to
23 July 22nd of last year, it arguably was a crime to possess
24 marijuana in any amount. But if you qualified under the medical
25 marijuana law, as I understand it, that statute gave you an

1 affirmative defense.

2 But then in July -- I think it was July 22nd -- of last
3 year, a new statute -- or -- the statute was changed. And the
4 effect of that change is that you can't be charged. In other
5 words, it's a total decriminalization as long as you complied
6 with the amounts of marijuana; in other words, if you complied
7 with the statute itself.

8 So, Mr. Wall, I think you've raised the issue. The
9 affidavit which I've read does not make any reference at all to
10 the statute, nor does it contain any information or any
11 statement as to the amount of marijuana that the officers
12 suspected was there. And if -- if it was -- if there's no
13 allegation that the state law had been violated, that raises the
14 issue as to whether or not it was a valid warrant, a valid
15 search.

16 There are two other issues that are related to this, and
17 that -- one is whether or not the good faith exception would
18 apply in view of the fact that the new law became effective
19 July 22nd and this search was the first day or two of November.
20 So there was a period of about three months in there. Would
21 reasonable officers be expected to understand that the law had
22 changed? And the warrant on its face arguably did not show
23 probable cause. And secondly -- and I don't know how strong the
24 argument would be -- is there sufficient information in the
25 affidavit to raise the inference that the amount that the

1 officers suspected was there at the house would be in excess of
2 that which is allowed under the medical marijuana statute?

3 How do you want to proceed? Mr. Smoot?

4 MR. SMOOT: The government's ready. I don't know if
5 the Court wants to hear from the defendant first or the
6 government.

7 THE COURT: Well --

8 MR. SMOOT: I mean, it's --

9 MR. WALL: Judge --

10 MR. SMOOT: -- somewhat of a -- oh. Go ahead. I'm
11 sorry.

12 MR. WALL: I didn't mean to interrupt. But my -- one
13 issue that I had just been discussing with co-defense counsel
14 prior to coming in this morning is that there was a motion filed
15 subsequent to the filing of our suppression motion to continue
16 the trial date and also continue dates for filing pretrial
17 motions and for hearing pretrial motions. And I believe that
18 there's -- it's anticipated that there will be additional
19 motions to suppress the evidence based upon the search warrant
20 that have -- on other grounds, that may or may not have some
21 overlap. And I don't know how the Court views whether or not
22 those motions affect whether or not the Court should hear this
23 motion at this time or not.

24 THE COURT: Well, I don't know what those other
25 motions are going to be. The Court is willing to continue this

1 hearing in anticipation of other motions and hear them all
2 together.

3 Mr. Fischer?

4 MR. WALL: Yeah. Maybe it would be appropriate to
5 hear from Mr. Fischer at this time.

6 THE COURT: You have -- I know you have a 404(b)
7 motion pending, Mr. Fischer.

8 MR. FISCHER: I do, Your Honor; and I also have a
9 motion to continue the pretrial and trial dates, and I filed
10 that May 11th. And that's Document No. 167.

11 The basis for the motion, Your Honor, is: As we know --
12 well, as this Court is very much aware of, having sat on the
13 bench for the several years that this Court has heard other drug
14 cases where there are qualifiers or predicates that could
15 enhance statutorily, under the guidelines, a punishment -- my
16 client -- it's been alleged, having reviewed the convictions of
17 my client in this state and other states, that there is
18 potential for those enhancements or pre-qualifiers --
19 qualifiers -- to enhance his punishment.

20 Having said that, then, we commonly try to work out
21 something with the government, or the government and the
22 defendant or defendants try to work something out prior to a
23 pretrial, and -- so that -- to avoid a filing of an 851. And
24 that's for many reasons. And I understand the reasons, and I
25 understand the reasons of the government -- that it has to put

1 its files in order, compare punishments to other defendants,
2 et cetera, and then come up with what it thinks is fair and
3 reasonable. And then the defendant and defendants have to have
4 a chance, of course, to review that and give it time to -- to
5 look at it and compare it to what the actual outcome could be if
6 convicted.

7 So having said that, I received an unofficial plea
8 agreement from the government late Friday afternoon. I wanted
9 to get it over to my client over the weekend, but prior
10 commitments in Benton County or Bonner County precluded that.
11 So the first time I could get to see my client was Tuesday, and
12 I provided that plea agreement. And it's a fairly heavy penalty
13 within the plea agreement itself; and so I have -- and the
14 deadline, of course, was today to accept or reject. And I'm
15 sure that Mr. Smoot would give more time for that. But the idea
16 is is that you don't file any substantive motions until you can
17 reach some sort of plea or start negotiations and find an offer
18 that the government is willing to put forward to the committee.
19 So we haven't filed any substantive motions except for a
20 discovery motion that I had attached and that I had subpoenaed
21 today from -- I had issued a subpoena to the Spokane County
22 Records Department to provide an unredacted version of what I
23 attached to my motion to continue. And that is a CAD report for
24 the -- that includes the investigations that began on
25 October 19th of 2011, or at least, according to the CAD report,

1 where the investigation was initiated by what appears to be
2 somebody unknown calling in to 911, indicating that there's --
3 that there's an underage drinking party and also several rooms
4 and greenhouses devoted to a marijuana grow -- interestingly
5 enough, at a different address. And I received that, and it was
6 redacted. And Mr. Smoot and I talked earlier before this
7 hearing; and he understood that perhaps I had gotten everything
8 I needed, and I didn't. So I wanted those records today so that
9 I could try to file additional pretrial motions, which I think
10 are very important in this case, one of them being a motion to
11 suppress, if we can't get together on some sort of plea that's
12 acceptable for both parties.

13 THE COURT: I think we have a prior provision in a
14 prior order that a motion filed by one defendant automatically
15 applies to all of them.

16 MR. FISCHER: Correct.

17 THE COURT: Don't we? So no one has opted out, so
18 Mr. Wall's motion applies to all -- all defendants, as far as I
19 know.

20 MR. FISCHER: Absolutely. And what I would like to do
21 is also have the opportunity, once I get this information, which
22 Mr. Smoot indicated that he would get to me today -- the
23 unredacted version of this CAD report, which is instrumental in
24 additional motions. So that's why I'm asking for a continuance.
25 So once I get this information from Mr. Smoot -- and he

1 indicated he'd get it to me ASAP -- then I can take a look at
2 the new information and file appropriate motions.

3 Now, I --

4 THE COURT: Let me ask -- are you suggesting another
5 motion to suppress for different reasons than the one raised by
6 Mr. Wall?

7 MR. FISCHER: Yes. It would be a motion to suppress,
8 I guess, unreasonable searches and seizures under the Fourth
9 Amendment, obviously, and that the warrant that was issued is
10 also unsatisfactory -- the affidavit in support of it.

11 THE COURT: For reasons different than those raised by
12 Mr. Wall?

13 MR. FISCHER: Yes, Your Honor.

14 THE COURT: All right. Well, the Court has no problem
15 in giving you more time if you want to do that. I think
16 Mr. Wall's motion is -- might be dispositive.

17 MR. FISCHER: And it very well could be. I've read
18 the motion, and I certainly do join in that motion.

19 THE COURT: Well, if there are other motions you
20 anticipate that would strengthen Mr. Wall's motion or support it
21 in some other way, I'm glad to give you more time.

22 MR. FISCHER: Well, Your Honor, if Mr. Wall's motion
23 is dispositive and -- or could be dispositive, and the Court
24 would entertain it today, certainly I'm in support of that. I
25 was just advising the Court that I would be filing additional

1 motions, and one of them would be a suppression motion. And I
2 think it would be for different reasons other than noncompliance
3 with state law.

4 THE COURT: Well, how do you want to proceed?

5 MR. FISCHER: I would ask for a continuance until --
6 at least to file additional motions -- into late July -- it's my
7 understanding the Court is not available in August -- and to
8 have my suppression motion heard in early September.

9 THE COURT: How -- well, let me ask you this. How
10 long would it take you to file your motion?

11 MR. FISCHER: It would take me until the end of June.
12 And I say that, Your Honor, because I need to go over the
13 information that Mr. Smoot is going to give me; follow up on my
14 investigation to do that; and, in connection with the other
15 ongoing issues that I have, filing a cert. petition.

16 THE COURT: Well, I'd rather not set this over into
17 September, for this reason. If the motions have merit -- and,
18 on the surface, they appear to be good motions -- I'd like to
19 get them resolved because I anticipate -- or -- I suspect that
20 one or more of the defendants are in custody.

21 MR. FISCHER: My client is in custody.

22 THE COURT: So I would suggest a shorter time for
23 filing, a response by the government in the five days, and a
24 quicker hearing.

25 MR. FISCHER: And when would the Court hear it?

1 THE COURT: Well, we can hear it -- let's say you had
2 two weeks to file your motion. Let's say by the 15th of June.
3 We could hear it sometime the last week of this month.

4 MR. FISCHER: Your Honor, would it -- would the Court
5 be available the second week of July?

6 THE COURT: We're in Yakima, Mr. Knutson, on the 9th?
7 (The courtroom deputy and the Court conferred off the
8 record.)

9 THE COURT: So we're here 10th. We're here July 10th.
10 Yes.

11 MR. FISCHER: That would be -- that would be fine,
12 Your Honor.

13 THE COURT: Mr. Smoot?

14 MR. SMOOT: I was just going to indicate that the
15 present trial date is June 25th. If the Court was looking at
16 the end of -- end of June for a hearing, it would seem that we
17 could get pleadings done by then.

18 THE COURT: We'd have to continue the trial date,
19 obviously; and that would require that everyone be advised of
20 their -- well, no. The speedy trial time runs out on the 19th
21 of July. So there is time.

22 All right. If you want to do that, if you want to support
23 Mr. Wall's motion with your own motion, I'm not going to
24 discourage you from doing that. But I would suggest that then
25 you'd have till June 22nd to file; June 29th, the government's

1 response; a hearing on the motions, pretrial conference on
2 July 10th.

3 MR. FISCHER: Very good, Your Honor.

4 THE COURT: At what time, Ms. Knutson?

5 (The courtroom deputy and the Court conferred off the
6 record.)

7 THE COURT: At 1:00.

8 Mr. Trejo?

9 MR. TREJO: Your Honor, not to -- not to step on my
10 good friend Mr. Fischer's toes, but the -- we would discuss the
11 other motion to suppress that we anticipate filing in this case;
12 and it's apples and oranges, compared to Mr. Wall's issue that
13 he's presented to the Court. The motion to suppress that we
14 anticipate filing deals with the possibility of a Franks hearing
15 of information that was omitted from the affidavit for search
16 warrant, the warrant -- what we perceive to be the warrantless
17 entry onto the property, the warrantless observation into the
18 residence, the --

19 THE COURT: That's fine. Can you get it all filed on
20 the --

21 MR. TREJO: Yeah. We can get it all filed in that
22 time. But what I'm suggesting to the Court is there's no reason
23 not to hear Mr. Wall's motion today because we can go -- he can
24 go forward on that. And then we can go forward on the other
25 one, if necessary.

1 THE COURT: I have no problem with that.

2 MR. TREJO: No, Your Honor.

3 THE COURT: All right. I started with a little
4 dialogue when we came out here. Anybody take issue with what I
5 said as to the Court's understanding of the facts and the change
6 in the law as it may apply, and the issues?

7 I think, Mr. Smoot, you may have the laboring oar on this.

8 MR. SMOOT: Thank you, Your Honor.

9 Respectfully, while the law may be in a constant state of
10 change and flux concerning marijuana within the state, that
11 doesn't -- that does not mean that whether or not a medical
12 affirmative defense or certain conditions precedent to the
13 commission of the general crime of manufacturing or distribution
14 or possession of marijuana simply negates the opportuni --
15 negates law enforcement's ability to investigate a potential
16 offense. In this case, let's say that -- well, quite frankly,
17 Your Honor, I think that -- rather to -- rather than go into
18 detail, I think that the briefing is quite detailed on both
19 parties. And I would submit that despite the change in the
20 wording from affirmative defense to may not be arrested,
21 contraband may not be seized, it does not repeal the general law
22 prohibiting the manufacture and distribution and/or possession
23 of marijuana within the state statutes. And having that law
24 still in effect, RCW 69.50.401 still having effect, law
25 enforcement is still charged with the investigation of that

1 particular valid law. It hasn't been repealed by the
2 legislature. They certainly could have repealed that while
3 amending the language to the compassionate use statute. They
4 did not. Nor did Fry -- nor is there any indication that Fry
5 has been reversed or withdrawn by statute.

6 The bottom line is that in a case like this, law
7 enforcement was investigating what it believed to be a potential
8 offense, that being RCW 69.50.401, that being the manufacturing
9 of marijuana, a crime in Washington state, a crime in the
10 federal law. In their search warrant, they put, in brief -- I
11 guess the Court has had the search warrant -- everything that
12 would typically be seen in a search warrant of an investigation
13 establishing probable cause for a marijuana grow. There was the
14 odor of marijuana, there was excessive power usage, there was a
15 visual observation of marijuana stems through the window, there
16 was a visual observation of growing equipment, and there were
17 vehicles -- a vehicle that was parked at the property that was
18 tied back to a person that had a prior conviction for a
19 marijuana offense. All of those things would stand alone on the
20 four corners of the affidavit to support probable cause to
21 search for a violation of 69.50.401.

22 THE COURT: I think that's clear that -- had that
23 occurred before July 22nd.

24 MR. SMOOT: Well, Your Honor, I think that --
25 here's -- here's the question, then. What does a state law

1 enforcement officer have to put in an affidavit in order to
2 investigate a potential offense? Not --

3 THE COURT: Well, in this case, I think it's clear
4 that that officer said that there were more than 45 plants
5 visible through the front door. That would indicate that the
6 grow was not in compliance with the medical marijuana act. But
7 the affidavit was totally silent on the amount. And I think
8 it's clear. I disagree with you. The language of 69.51A.040
9 says that -- in effect, that medical use of marijuana does not
10 constitute a crime. So there has to be some indication, it
11 seems to me, in the search warrant that what was involved here
12 was marijuana in a quantity at least that was noncompliant with
13 the state law; and there's no reference to it.

14 MR. SMOOT: Yes. Your Honor, I think that that begs
15 the question, then: How does law enforcement obtain that type
16 of information? In fact, if law enforcement has all the
17 indications of a violation of the general marijuana statute but
18 has no ability to determine whether or not an individual is in
19 compliance with very strict, specific conditions precedent to
20 whether or not they violated that statute, then that
21 investigation can never be accomplished through a search
22 warrant. In other words, Your Honor, search warrants are
23 simply whether that it's more probable -- that there's a
24 probability that evidence of a crime may be found in the
25 location searched.

1 Just because a search warrant is issued for a location
2 doesn't necessarily follow that law enforcement is always going
3 to find evidence of a crime. In this case, the law enforcement
4 officers believed that it was likely that evidence of the
5 general marijuana crimes would be found at that location. Had
6 they entered and they would have found one person in there with
7 a marijuana card and a 13-plant grow, then they would have had a
8 decision to make. Have they violated the main general marijuana
9 law that we are -- we believe we have probable cause to
10 investigate, or have they not? Whether it's simply no longer a
11 crime or whether it's an affirmative defense, the result is
12 still the same. There has to be certain conditions precedent.
13 And when they show up and observe that those conditions are
14 precedent, then they can say: All right; well, we were -- we
15 were mistaken. Our search warrant was not fruitful. But we
16 still had the probable cause to initiate the investigation to do
17 the search warrant.

18 In -- in -- what I wanted to add as well as -- one of --
19 one of the concerns, I believe, in this case or cases like this
20 is the way that the new -- the new provision is written. The
21 United States would submit that it indicates that people may not
22 be arrested, contraband may not be seized if the conditions
23 precedent -- if it's compliant with the parameters of the
24 compassionate use provision. Now, I understand that -- from the
25 defendant's reply that there's a disagreement in terms of the

1 word use of "may," "may not," "shall," "shall not." But I would
2 submit that one of the reasons -- arguably, one of the reasons
3 for such language is protection of law enforcement.

4 Now, law enforcement, prior to the compassionate use
5 provision -- had they executed a search warrant, found marijuana
6 growing, found contraband, illegal contraband, present in a
7 place that they're executing a search warrant, and had they
8 leave it there, I would argue that they could potentially be
9 under some type of liability if something happens from leaving
10 contraband in a public -- in with the public in this type of
11 circumstance. When the compassionate use law comes out and all
12 of a sudden now state law enforcement officers have to go into
13 residences like this or other buildings or other locations with
14 a search warrant that's been issued based on a belief that
15 there's going to be evidence of the general -- violation of the
16 general controlled substance act if they enter a place and they
17 find contraband in there, now they're in a position to where
18 they can make a decision as to say: Okay; we were right. There
19 was marijuana growing here. Everything that we set forth in the
20 search warrant to obtain probable cause ultimately was correct.
21 We smelled it. Everything. They show up. All right. Here's
22 the circumstance where there's one person. There's 13 plants.
23 I am ad libbing. But let's say that they have their -- a
24 checklist, and they're checking it off. Okay. It looks like
25 all conditions are fine. We've made a record of this. We're

1 leaving.

2 Now something happens with that contraband. There's a use
3 of that contraband by someone. Something happens down the line.
4 Law enforcement is no longer liable for leaving that contraband
5 out in the public.

6 Now -- so it's kind of a twofold argument. The United
7 States, again, believes that this is very simple. It is a legal
8 argument. The warrant itself within the four corners had
9 sufficient information for the violation of the general --
10 violation of the Washington controlled substance act -- law
11 enforcement, according to state law, state case law, that
12 predates the change in the wording of the compassionate use
13 statute.

14 THE COURT: That's an important distinction.

15 MR. SMOOT: I think it is important, yes, because it
16 has changed. But what is the effect of that? Fry is not --
17 there's no indication that Fry's general principle that law
18 enforcement doesn't to prove a negative to do the search warrant
19 or doesn't have to -- they would -- typically, they would have
20 to prove that all of the conditions precedent -- meaning every
21 single person, every single plant was accounted for, every
22 single condition that is required of the compassionate use
23 section, .040, which is still written in there -- if the person
24 complies, is in compliance with it, they would have to disprove
25 that first without any -- necessarily any way to get that

1 information in order to pursue what they believe may be a
2 violation of another offense.

3 THE COURT: Well, it may be less complicated than
4 that. Before July -- and I throw this out as one way to read
5 it. Before July 22nd of last year, if law enforcement had the
6 same indications that the general marijuana statute was being
7 violated, they could charge the crime; and then the defendant
8 would have the affirmative defense that he or she was protected
9 because of the medical marijuana provision.

10 It seems to me that after July 22nd, the law has changed.
11 Possession or growing marijuana in an amount that is consistent
12 with the medical marijuana law is not a crime. So you don't
13 have an affirmative defense. You just can't be charged. And
14 that's what concerns me in this case. The affidavit doesn't
15 give any indication that there's a state crime that's been
16 violated. It's true there's plenty of indication that marijuana
17 is growing, but there's no indication that it's growing in an
18 amount that takes it out of the medical marijuana exceptions.

19 MR. SMOOT: Well, I would argue, Your Honor, that even
20 if there were two out of -- I don't know the sum total of how
21 many particular --

22 THE COURT: Plants.

23 MR. SMOOT: -- qualifications or conditions need to be
24 met. But let's say that there's two conditions -- one, that
25 somebody has an authorization card and, two, that somebody has

1 less than a certain number of plants. All right? Even if they
2 had one of those, those conditions would still -- it would still
3 be a violation of the general provision if those conditions are
4 not met. In other words, let's say that the person has no
5 authorization to use marijuana through the state and yet they
6 only have ten plants. That still, arguably, falls under the
7 general provision. So -- of the violation of possession or
8 manufacturing of marijuana. So, in other words, if law
9 enforcement -- the plant count number suddenly may not be
10 necessary. In fact, it would -- that's the type of factual item
11 that would arguably almost be impossible for any law enforcement
12 officer to put in an affidavit unless the marijuana plants were
13 growing within a publicly accessible location. Inside a house,
14 it would be -- I don't think it would ever be seen in an
15 affidavit.

16 Arguably, Your Honor, as well, I would submit that there's
17 not an affirmative defense to investigation of a potential
18 crime. Let's take this in a complete different context. A
19 person can be charged for a crime -- for an offense that's
20 wholly unrelated to a search warrant. In the context of a
21 federal drug warrant issued by the magistrate, a federal agency
22 goes in, believes absolutely that there's going to be evidence
23 of a drug-trafficking crime within a residence. DEA goes in,
24 executes the search warrant. While they're looking for drugs,
25 they don't find any drugs; but what they -- but they find a

1 firearm. It just so happens that --

2 THE COURT: In plain view.

3 MR. SMOOT: In plain view or where they should be
4 looking for drugs.

5 Now they've gone in. They've executed a search warrant on
6 the basis of a violation of the drug laws. They go in. They
7 find out that they have no evidence that the defendant violated
8 the drug laws. But the defendant ultimately violated another
9 law. That defendant can be charged. That defendant can be
10 convicted of that offense even though the defendant never
11 violated the law that the search warrant was being executed for.
12 In this case --

13 THE COURT: Using your hypothetical, if the search
14 warrant had said that law enforcement anticipates that the
15 house -- in the house is a firearm, but it doesn't say that the
16 occupant of the house is a felon --

17 MR. SMOOT: Uh-huh?

18 THE COURT: -- the search warrant is not valid, is it?

19 MR. SMOOT: Well, it depends. I mean, if there's not
20 something that ties it in to the firearm offense, then it may
21 be -- it may be that -- I mean --

22 THE COURT: The reason I said that is it's not illegal
23 to have a firearm in your house. I hope not.

24 MR. SMOOT: That -- as do I, Your Honor.

25 THE COURT: Yeah. And by the same token, it's not

1 illegal to have some marijuana in your house as long as it
2 complies with the medical marijuana statute.

3 MR. SMOOT: And that is the question.

4 THE COURT: In other words, as to amount and that
5 you're sick and you need it.

6 MR. SMOOT: That is the question, Your Honor; and that
7 is the "if" that's there -- if it complies. If it doesn't
8 comply, then it's illegal in both the state of Washington and
9 the federal government.

10 THE COURT: Doesn't the affidavit have to -- does not
11 the affidavit need to contain an allegation that -- that state
12 law is being violated for some reason; in other words, that the
13 officer had reason to believe that there's an excessive amount
14 or that the occupants don't qualify? In other words, there has
15 to be something within the four corners of the affidavit to
16 indicate that that -- not only is marijuana there, but there is
17 marijuana there that takes it out of the exception of the
18 medical statute?

19 MR. SMOOT: I would respectfully argue no. And the
20 reason for that is because if the search warrant provides
21 probable cause for a violation of a statute, then that is
22 sufficient. And the -- and our -- and the United States'
23 position is that the search warrant provided probable cause for
24 the violation of the general statute.

25 THE COURT: Okay. I agree with that. But this

1 statute says that if you have marijuana in accordance with the
2 terms of that chapter, it does not constitute a crime. It's not
3 a crime, according to the statute.

4 MR. SMOOT: That is --

5 THE COURT: So if the affidavit says that law
6 enforcement is aware of the fact that there's marijuana in the
7 house, period, is it a valid statute -- I mean -- warrant?

8 MR. SMOOT: I believe it's valid to investigate a
9 crime that fits with -- if it provides probable cause for a
10 crime that is on the books.

11 THE COURT: And --

12 MR. SMOOT: And it may --

13 THE COURT: -- by saying that, you're referring to the
14 general statute.

15 MR. SMOOT: Right. It may not support a -- the
16 investigation ultimately may not support a conviction. It may
17 not support an arrest. It may not support a seizure. But for
18 investigative purposes alone, if the warrant supplies probable
19 cause for a law that is on the books, then law enforcement
20 has -- has a legal authority to execute that search -- that
21 warrant.

22 THE COURT: All right. I think I understand your
23 position.

24 MR. SMOOT: Thank you.

25 THE COURT: Mr. Wall? Your turn.

1 MR. WALL: Thank you, Your Honor.

2 Your Honor, Mr. Smoot is a very good lawyer, a very
3 intelligent and a very creative lawyer; and I commend him for
4 being able to find a way to take a position on this because I
5 think the Court stated the issue very clearly at the beginning
6 of this hearing and that it is pretty black and white. When you
7 read the amendment to the medical marijuana laws in 2011, it's
8 very clear what the legislature was trying to do. It became
9 obvious that making the medical use of marijuana an affirmative
10 defense didn't accomplish what the legislature was trying to
11 accomplish because being subject to arrest, imprisonment, and
12 all the consequences of that wasn't protecting people who were
13 using marijuana for medical purposes. When all you have is an
14 affirmative defense, it's not much protection. You can still be
15 hauled out of your home and thrown in jail, and you may sit
16 there for a long time until you get a chance to put your defense
17 on. So it was obvious the statute wasn't doing what it was
18 intended to do; and the change was made, and it's very clearly
19 stated. As you pointed out more than once, it's no longer a
20 crime to use marijuana or to possess marijuana as long as you
21 conform to the requirements of the statute.

22 Now, one of the basic fallacies of Mr. Smoot's argument is
23 that he wants to read the statutes as if they're totally
24 separate and not connected in any way, but you cannot do that.
25 And I think in our reply brief, we cited the cases to the Court

1 that you must read statutes together, as a whole, to determine
2 the legislative intent. And so Mr. Smoot says, well, ignore the
3 medical marijuana law; look only at the general statute; and we
4 can use that alone to determine whether or not there's probable
5 cause to make a -- commit a -- probable cause that a crime was
6 committed. But, in fact, you cannot do that because it's not
7 a -- it's not a question of whether or not, if you read
8 something in isolation, you can argue a crime was committed.
9 You have to read the statute in its totality to determine what
10 is and what is not a crime, just as Your Honor has pointed out.
11 So that's the basic fallacy, is that you cannot read one part of
12 the statute separate from another, as if they don't exist
13 together, because they do exist together.

14 Mr. Smoot then takes that and tries to argue that,
15 essentially, if you have reason to investigate, you have enough
16 information to get a warrant, which is, again, not really what
17 the law is. You can investigate based on suspicion. You can
18 investigate based on a hunch. But to get a warrant, to get
19 authorization to go where otherwise you're not legally allowed
20 to go, you have to have probable cause.

21 So he argued quite a bit about, well, you know, it
22 doesn't -- maybe you're going to go in and not find enough
23 evidence to support a charge, but certainly that -- that
24 happens -- that can happen any time you're investigating a crime
25 and you're -- and you're executing a warrant, because a warrant

1 is only based on probable cause, not absolute proof. So that
2 argument really doesn't help any because that's always the case.

3 So the question still has to always come back to: Does
4 this affidavit give the issuing judge enough evidence to
5 determine that, more likely than not, a crime was being
6 committed and the evidence of that crime would be found at the
7 place the officers wanted to search? And as you have pointed
8 out more than once, there's nothing in this affidavit to
9 indicate that what the officers saw at that residence indicated
10 any use or possession or manufacture of marijuana that did not
11 conform with Washington's medical marijuana law. There's just
12 no mention of anything that would allow the issuing judge to say
13 this doesn't -- this isn't medical marijuana use in conformance
14 with the Washington law. I've seen --

15 THE COURT: There are limits, are there not, as to how
16 much is justified?

17 MR. WALL: Yes. There's nothing to say there's more
18 than 45 plants, which would be the maximum you could have even
19 if you have a communal grow. There's nothing to say that there
20 is possession of more than the allowed amount. There's no
21 mention of whether or not anybody associated with this address
22 has or does not have authorization to use medical marijuana.

23 You know, some of these things may be difficult for law
24 enforcement officers to obtain, admittedly. It may be
25 difficult. It may not be easy. But the Constitution doesn't

1 make exceptions just because it's difficult for officers to get
2 information or to get evidence. The Constitution still requires
3 probable cause.

4 THE COURT: Now, the affidavit does talk about a
5 strong odor. It talks about seeing, apparently in plain sight,
6 through the window, plants and roots and plastic tarp. There's
7 indications they saw piping, greenhouses, frames that are
8 typically used, a high power consumption. Is there enough to
9 suggest by implication that what's going on exceeds the
10 limitations of the marijuana statute, the medical marijuana
11 statute?

12 MR. WALL: I think maybe there could have been, Your
13 Honor. But what I think is obvious is that these officers
14 weren't up to date on the law. They had no clue that they
15 needed to give that information to the judge.

16 THE COURT: And that raises another question I had.
17 There's only about 90 days between the change in the law and
18 when all this happened. Does that raise the good faith
19 exception possibility?

20 MR. WALL: I would say that's -- very clearly shows
21 that there's not good faith because any well-trained officer is
22 going to be informed prior to the law going into effect that on
23 this date, the law changes, and you need to change how you
24 behave out in the field.

25 THE COURT: So in other words, the officers should

1 have been aware of it by July 23rd, the day after the law came
2 into effect? That's your position?

3 MR. WALL: Just as -- just as it is for someone who is
4 charged with a crime that ignorance of the law is not an excuse,
5 it's not an excuse for a law enforcement officer either.

6 But to get back to your other question, the officers may
7 have been able to very easily here construct an affidavit that
8 would have been sufficient. They may have been able to say:
9 Based on my experience -- and detailing that experience for the
10 judge -- this kind of power usage is only associated with
11 something well in excess of 45 plants. And the law only allows
12 45 plants in any one grow, even if you have ten people together,
13 doing a communal grow. We saw other indications that the amount
14 of -- the size of the grow area, the amount of piping or
15 whatever -- the amount of soil we saw present clearly
16 demonstrates in excess of the allowed amount of plants -- and
17 explaining that for the judge who is reading this. But they did
18 none of that. They did absolutely none of that.

19 Now, I don't know -- I mean, they showed power usage; but I
20 don't know what that means. I don't -- I can't imagine the
21 judge knew either. Unless you're an experienced marijuana
22 grower, you wouldn't have any idea whether that power usage
23 indicates more than the allowed amount of plants. And that's
24 the problem. They just didn't address it in any way in the
25 affidavit.

1 So I think Your Honor has, from the beginning, had this
2 pegged right exactly as it is. The law changed dramatically.
3 It's a huge change to go from an affirmative defense to this is
4 not a crime. I think it's clear the law enforcement officers in
5 this case either weren't aware of it or certainly didn't have
6 that in mind when they wrote this affidavit because they didn't
7 address that issue at all. It's like -- Mr. Smoot said it.
8 Yeah. They put in a typical affidavit for establishing that
9 marijuana was being grown, but that's all that it establishes.
10 And that affidavit probably would have been -- would have been
11 sufficient probably before July 22nd, 2011.

12 THE COURT: Oh, I think it's clear it would have been.

13 MR. WALL: But afterwards, it's clearly not.

14 Thank you.

15 THE COURT: Now, before, Mr. Smoot, you reply, any
16 other defense counsel have anything you want to say? Mr. Vieth,
17 Mr. Trejo, Mr. Fischer?

18 MR. VIETH: No, Your Honor. Thank you.

19 MR. FISCHER: No, Your Honor.

20 MR. TREJO: Your Honor, just briefly.

21 Your Honor, as I -- as I listened to the government's
22 argument, it appears that, in part, what they're arguing is they
23 should be justified in going into the residence with the search
24 warrant and then thereafter determining that, hey, we were
25 right.

1 THE COURT: Or wrong.

2 MR. TREJO: Or wrong. And if we were wrong, sorry.

3 But the law does not permit them to do that. They're
4 required to do additional investigation when they have a hunch.
5 And when the government argues that they would never be able to
6 enter, well, that's not true, because how many countless cases
7 have we seen throughout the years where they use informants,
8 they use other investigative techniques in order to gain enough
9 information to establish probable cause for -- to enter a
10 residence? And in this case, they simply didn't have sufficient
11 facts to warrant the entry.

12 In terms of the power usage, there's -- I've never seen a
13 situation in all the marijuana cases that I've done where
14 there's been any expert opinion or any finding that a certain
15 amount of kilowatts is designated per plant. Instead, you could
16 have quite a bit of electric consumption in a particular room
17 and just have one plant in there. There's no correlation
18 between the two, unless they would have provided additional
19 information.

20 THE COURT: Mr. Fischer, were you going to say
21 something?

22 MR. FISCHER: No, Your Honor.

23 THE COURT: Anybody else? Mr. Vieth? Anybody else?
24 Mr. Smoot, any reply?

25 MR. SMOOT: Your Honor, I think in brief the

1 argument's before the Court. The United States stands by its
2 argument at this point and indicates that the entire affidavit
3 has been provided to the Court within the pleadings.

4 THE COURT: Yeah. We -- yes. We have the entire
5 affidavit, as far as I know.

6 MR. SMOOT: That is correct. And while we haven't
7 gone into much discussion, I think that the United States has
8 briefed in terms of the good faith exception. I simply want to
9 make sure that that's before the Court as well.

10 Respectfully, the United States would again submit that
11 there is probable cause for the violation of the Uniform
12 Controlled Substances Act; specifically, RCW 69.50. -- I think
13 401 is what I cited.

14 THE COURT: What if the -- what if we just forgot
15 about the controlled substance act and the only statute we had
16 was this one that we're talking about, 69.51A.040? That's the
17 only statute.

18 MR. SMOOT: You mean the only statute we have in
19 existence?

20 THE COURT: No. The only statute that applies to this
21 issue that we're talking about. You don't have the general
22 statute. You just have -- you just have the one.

23 MR. SMOOT: Well, arguably, Your Honor, if we didn't
24 have the general statute, I don't think we'd have the exception
25 statute.

1 THE COURT: Well, I guess it's not a very good
2 question. But the point I'm trying to make is: If you just had
3 the one statute that I just cited and you didn't say in your
4 affidavit that there was reason to believe that the quantity
5 involved exceeded the amount allowed by the medical marijuana,
6 this statute says that would not be a crime. In other words,
7 you have to allege that not only there's some marijuana, but it
8 exceeds that which is allowed by the medical marijuana statute,
9 wouldn't you? And if you don't have probable cause to believe
10 that, then there's no crime.

11 MR. SMOOT: Forgive me. I'm trying to follow Your
12 Honor. I think if --

13 THE COURT: Maybe I'm not very clear in my question.

14 MR. SMOOT: I think if the general provision wasn't in
15 existence and only a provision that says this is a crime if you
16 don't do A, B, and C -- in other words --

17 THE COURT: You're -- you're relying on the general
18 controlled substance act as a justification for getting a search
19 warrant.

20 MR. SMOOT: Yes. For investigative purposes.

21 THE COURT: And I'm suggesting that that statute,
22 which says, in effect, there's no crime in possessing marijuana
23 as long as you comply with the medical marijuana act --

24 MR. SMOOT: So if there was no general statute, then
25 the statute -- then the statute that would be in existence would

1 be written something to the effect that if a person doesn't do
2 A, B, and C, then they have violated the law.

3 THE COURT: Well, is that --

4 MR. SMOOT: And -- and --

5 THE COURT: Go ahead.

6 MR. SMOOT: -- I guess if that were the case, then
7 investigations would certainly be conducted differently, if that
8 were the only statute in existence.

9 The difficulty is that at this point, the statutes apply
10 not only for investigative purposes but also prosecutorial
11 purposes and clear down the line. In this case, again, the
12 United States submits that the local officers had a search
13 warrant that supported probable cause for a violation of state
14 law. They also had a search warrant, arguably, that would have
15 supported probable cause had it been presented in federal court,
16 under federal standards. So in this case, the law enforcement,
17 local law enforcement, executed an author -- an issued search
18 warrant based on probable cause of a violation of an existing --
19 currently existing law.

20 THE COURT: State law.

21 MR. SMOOT: State law -- correct -- as well as while
22 they -- while the state law enforcement officers sought it from
23 a state judge, it still would be a violation of federal law.
24 And the search warrant would support probable cause had it
25 been -- arguably, had it been presented to federal court.

1 THE COURT: Yeah. But that's not the situation.

2 MR. SMOOT: But the situation is, however, Your Honor,
3 that law enforcement was conducting an investigation, was
4 conducting a violation -- an investigation of a law on the
5 books. And ultimately, had they entered the premises with the
6 valid -- with the valid -- and I say "valid" in terms of being
7 signed by the state court judge. Had they entered, found out
8 that, in fact, what was occurring was not a violation of the
9 law, then there would have been -- arguably, the investigation
10 would have stopped; or at least it would not have resulted --
11 gone to the prosecutorial stage, which laws also cover.

12 Simply put, at this point of the investigation of issuing a
13 search warrant -- of obtaining a search warrant, the law
14 enforcement officers were investigating the general provision
15 that arguably is still valid in the state of Washington and as
16 well as federal law for what -- for what it's worth in terms of
17 federal law.

18 THE COURT: Well, my inclination is that the search
19 warrant was not complete; and my inclination is that the
20 execution, therefore, was improper, which would then logically
21 suggest that the motion to suppress should be granted.

22 Now, I -- assuming that's the ruling, what is it that would
23 be suppressed? I guess you'd suppress the physical evidence you
24 found in there. And if I understand it, certain defendants made
25 certain statements following the execution of the search

1 warrant. Wouldn't those necessarily be referred to as the
2 fruits of the invalid execution?

3 MR. SMOOT: Most likely, Your Honor. I don't want to
4 commit as though there may be an exception. But -- you know --
5 most likely, it would be.

6 THE COURT: Yeah. That wasn't dealt with in any great
7 length in the briefing, but I assume that would be the case.

8 Well, I'm going to take a look at a couple of cases and get
9 an order out in a day or two. But right now, there are a couple
10 of other motions pending. There's a 404(b) motion filed by you,
11 Mr. Fischer.

12 MR. FISCHER: Yes, Your Honor.

13 THE COURT: It seems appropriate that that should be
14 granted. And if I understand it correctly, the government
15 probable has turned over any 404(b) evidence that you have. But
16 I think the responsibility also would be on the government to
17 turn over any 404(b) evidence that comes into your possession or
18 you become aware of.

19 MR. SMOOT: Yes, Your Honor. And as typically
20 happens, sometimes during trial interviews, more comes out. And
21 it's the government's position to turn that over.

22 THE COURT: Now, we have a trial date of June 25th.
23 Speedy trial time out is July 19th. I'm suggesting we leave
24 those dates as is.

25 MR. SMOOT: Your Honor, I would just advise the Court,

1 as I have advised the parties, that if this case proceeds to
2 trial that, as the Court and the parties are aware, there is a
3 question of plant count involved in this case. Simply put,
4 there was approximately five to six hundred growing plants.
5 There were five to six hundred plants that had been removed, and
6 there were just roots remaining of the plants. In terms of the
7 conspiracy charge, the United States has indicated that if this
8 case goes to the jury that it would put that plant count
9 question before the jury, which would ultimately mean a
10 superseding indictment. None of the facts would change with the
11 superseding indictment, but the -- it would likely be sought
12 either next week or, if the continuance goes beyond the first
13 grand jury setting in July, then it would probably be sought
14 then.

15 THE COURT: I suppose, though, if this motion to
16 suppress is granted, that would moot that issue.

17 MR. SMOOT: That is correct.

18 THE COURT: And if -- if the motion is not granted,
19 then what I'm going to do is set another pretrial conference in
20 short order and reschedule.

21 MR. SMOOT: All right.

22 THE COURT: Anybody else have anything they want to
23 talk about?

24 MR. FISCHER: No, Your Honor.

25 MR. TREJO: No, Your Honor.

1 MR. VIETH: No, Your Honor. Thank you.

2 THE COURT: We're in recess.

3 (The proceedings recessed at 10:32 a.m.)

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C E R T I F I C A T E

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 18th day of June, 2012.

/s/Debra Kinney Clark

Official Court Reporter
United States District Court
Eastern District of Washington